(3)

No. 09-1059

IN THE

Supreme Court of the United States

ELECTRONIC TRADING GROUP, LLC,
On behalf of itself and all others similarly situated,

Petitioner,

—v.—

BANC OF AMERICA SECURITIES LLC, BEAR STEARNS COMPANIES, INC., CITIGROUP INC., CREDIT SUISSE (USA) INC., DEUTSCHE BANK SECURITIES INC., GOLDMAN, SACHS & CO., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. INCORPORATED, UBS FINANCIAL SERVICES, INC., CIBC WORLD MARKETS CORP., CITIGROUP GLOBAL MARKETS, INC., CREDIT SUISSE SECURITIES (USA) LLC, GOLDMAN SACHS EXECUTION & CLEARING, L.P., MORGAN STANLEY DW INC., THE GOLDMAN SACHS GROUP, INC., and VAN DER MOOLEN SPECIALISTS USA, LLC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents' Brief in Opposition misstates the grounds of the Petition and raises new points.

Accordingly, we respectfully reply.

I. THE NATIONAL IMPORTANCE OF THE ISSUES RAISED JUSTIFIES THE GRANTING OF CERTIORARI

The Second Circuit's erroneous decision in this case, standing alone, justifies this Court's grant of certiorari. Contrary to Respondents' assertion, the lack of disagreement to date among the circuit courts regarding implied antitrust immunity under *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), is not dispositive. No such conflict is required for this Court to exercise its discretion to review a decision with important nationwide implications such as this one.

Indeed, Supreme Court Rule 10 states that a decisional conflict between circuit courts is "neither controlling nor fully measur[es] the Court's discretion" to review a lower court's ruling. Where, as here, a court of appeals "has decided an important federal question in a way that conflicts with [a] relevant decision[ ] of this Court," a writ of certiorari is warranted. *See* Supreme Court Rule 10(c). The Second Circuit's prohibition of antitrust remedies for horizontal price-fixing in the securities lending markets undoubtedly qualifies as an important federal question warranting this Court's consideration.

II. THE SECOND CIRCUIT MISSTATED THE *BILLING* FACTORS, FINDING CONFLICT BETWEEN FEDERAL SECURITIES AND ANTITRUST REGULATION WITHOUT OBTAINING THE VIEWS OF THE GOVERNMENT AGENCIES INVOLVED

Contrary to Respondents' assertion, Petitioner does not "acknowledge[] that the court of appeals correctly articulated the *Billing* factors." Brief in Opposition at 3.

In fact, the court of appeals failed properly to state the *Billing* factors. It interpreted too broadly the first three *Billing* factors, so as to include all short selling activities. *Billing* mandates a narrower focus, *e.g.*: "the relation of the *specific conduct at issue* to both sets of laws." *Billing*, 551 U.S. at 271 (emphasis added). However, the court of appeals erroneously found conflict notwithstanding that "none of the provisions [of the securities laws or regulations] explicitly references the regulation of the borrowing fees." Pet. App. at 14a. *See also id.* at 17a ("Regulation SHO and the recent roundtable do not focus on the regulation of borrowing fees (the particular conduct alleged to be anticompetitive)").

The Securities and Exchange Commission ("SEC") has never indicated any interest in regulating "the specific conduct at issue"—securities borrowing fees. Uninformed by the views of either the Antitrust Division of the Department of Justice ("DOJ") or the SEC, the court of appeals erroneously found an actual and potential conflict between their two regulatory regimes. Pet. App. at 18a-21a. It simply speculated that antitrust lia-

bility for price-fixing might inhibit permitted communications and conflict with potential future SEC regulations of securities borrowing fees. *Id.*

Respondents acknowledge that no testimony or information was adduced with respect to the SEC's practices or intentions "from any government agency or third party." Brief in Opposition at 4, n.1. Respondents nevertheless claim that "no further information is needed [to] grant a motion to dismiss," as "there is a clear statutory and regulatory framework." *Id.*

This is meritless.

Nothing in the securities laws or regulations implied the immunity found by the court of appeals. Moreover, the decision of the Second Circuit stands in stark contrast with *Billing* itself, in which the SEC filed a brief in opposition to the DOJ "seeking total preclusion of the antitrust laws." *Billing*, 551 U.S. at 284. Whether a court of appeals should obtain and consider the views of government agencies before finding a "clear repugnancy" in their regulatory activities is an important question of federal law which has not been—but we respectfully submit should be—settled by this Court.[1]

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[1] In each of the prior decisions cited in *Billing* to "specifically address the relation of securities law to antitrust law," 551 U.S. at 271, this Court and the lower courts similarly had the benefit of the views of the government. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 660 (1975), *aff'g* 498 F.2d 1303, 1304 (2d Cir. 1974); *United States v. National Assn. of Sec. Dealers, Inc.*, 422 U.S. 694, 697 (1975), *aff'g In re Mutual Fund Sales Antitrust Litig.*, 374 F. Supp. 95, 96 (D.D.C. 1973); *Silver v. New York Stock Exch.*, 373 U.S. 341, 342 (1963), *aff'g* 302 F.2d 714, 715 (2d Cir. 1962).

Finally, Respondents do not directly address Petitioner's suggestion that this Court invite the Solicitor General to provide the views of the United States on whether the writ should be granted. We respectfully submit such an invitation is particularly appropriate here.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 15, 2010

Respectfully submitted,

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